IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 72/09
5162108

	BETWEEN	LAURIE JAMES BROWN Applicant
	AND	AVON PICTURE MOULDINGS LIMTIED Respondent

Member of Authority:	James Crichton
Representatives:	Scott Fairclough, Counsel for Applicant Brian Nathan, Counsel for Respondent
Investigation Meeting:	27 May 2009 at Christchurch
Determination:	2 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Brown) was employed as Production Manager by the respondent (Avon) at its Christchurch premises. On 20 April 2009, Mr Brown was suspended allegedly for removing property from the workplace. There was a meeting between the parties on 27 April 2009 and subsequently statements were provided to Mr Brown for his comment and explanation. On 8 May 2009 Mr Brown was summarily dismissed from his employment.

[2] Mr Brown says that nothing he has done could justify a finding of serious misconduct or the penalty of summary dismissal and he raised a personal grievance in which amongst other things he sought permanent reinstatement to his position. Further, he makes this application for interim reinstatement pending an investigation of the substantive matters which I have agreed to hear on 22 July 2009.

[3] The application for interim reinstatement is resisted by Avon on the basis that the termination of Mr Brown's employment was justified in all the circumstances and

that there are *relevant and persuasive factors* which militate against interim reinstatement.

Issues

[4] In order to succeed in an application for interim reinstatement, the Authority must apply the law relating to interim injunctions but also have regard to the object of the Employment Relations Act: s.127(4) of the Employment Relations Act 2000 (the Act).

[5] The law concerning interim injunctions requires the consideration of three broad issues and it is the examination of those three issues that forms the basis of this determination. Those three issues are:

(a) Whether the applicant has an arguable case?

(b) Where does the balance of convenience lie?

(c) What is the overall justice of the case?

[6] The object of the Employment Relations Act 2000 which is referred to in s.127(4) is a reference to s.3 of the Act. Section 3 lists a number of important principles which underpin the statute, including for instance building productive employment relationships and promoting good faith behaviour.

Does the applicant have an arguable case?

[7] I am satisfied that Mr Brown does have an arguable case. This point is not conceded by Avon who contend that the policies which they say Mr Brown breached were well advised to Mr Brown and that he knew the consequences of his actions when he undertook them. Furthermore, and critically, Avon contend that Mr Brown removed a load of wood from Avon which he had not paid for, in breach of Avon's policy, thus raising an issue of serious misconduct for which dismissal was an appropriate sanction in all the circumstances.

[8] I think with respect, that that contention begs the question. The whole basis of the dismissal relies on a particular interpretation of the evidence around the conversation that took place between Mr Brown and a Mr Batten a member of the management team of Avon. There is no question that there was a conversation between the two men and that this conversation took place on the afternoon of 9 April

the day that it is alleged that Mr Brown breached his obligations to Avon by removing its property without authorisation.

[9] It is Mr Brown's deposed evidence that he sought to have Mr Batten raise an invoice for the wood which he was removing from the premises and that there was an agreement between the two men that, because Mr Batten did not know the price, Mr Brown would *fix Avon up* on his return from leave on 20 April 2009.

[10] Mr Batten absolutely denies any such arrangement took place but of course, all the Authority has to rely upon at this point is untested affidavit evidence.

[11] If Mr Brown's recollection of the discussion with Mr Batten is correct then Mr Brown must have an arguable case. In circumstances where the Authority has not been able to hear the witnesses give their evidence and test that evidence in the usual way, it is difficult not to reach the conclusion that the relatively low threshold for an arguable case has been achieved.

[12] I also accept Mr Fairclough's submission that Avon seems to have *targeted* Mr Brown who appears to have been the only employee whose behaviour Avon was concerned with. Mr Fairclough suggests, and I agree, that in those circumstances, it may be that a fair and just employer would have explicitly put Mr Brown on notice that were he to remove wood from the premises without having first paid for it, that would be serious misconduct and might result in summary dismissal.

[13] I think this submission has particular force because of the sense in which the present owners of Avon were endeavouring to address Mr Brown's longstanding behaviour. The subject behaviour had previously been tolerated (and perhaps even encouraged) by the previous owners of the firm. In those circumstances, it may be that the onus on the employer to change longstanding behaviours of employees, is all the greater.

[14] As I have indicated, I have reached the conclusion that Mr Brown's application clears a relatively low threshold required of *an arguable case*. There are matters, including the matters referred to by Mr Fairclough which I refer to above, which raise questions about the way in which Avon proceeded. Of course, in matters of this kind, there will often be issues about the employer's process about which there may be criticism. The Authority must always exercise caution in dealing with interim applications of this kind where the only evidence is untested affidavit evidence. That

caution will be particularly appropriate where there is, as in this case, a straightforward conflict on the facts which underpins the decision of the employer to dismiss.

Does the balance of convenience favour Mr Brown's application?

[15] The essence of the Authority's obligation in this regard is to consider the relative inconvenience to each of the parties, of the other succeeding. In a practical sense, the Authority must weigh a relative hardship to Avon of having Mr Brown returned to the employment against the hardship potentially suffered by Mr Brown in remaining away from the employment for a further period until the substantive hearing determines the matter one way or the other.

[16] In resisting Mr Brown's application, Avon seek to tilt the balance of convenience in their favour by referring to two matters which were discovered post dismissal. The first of these is information about another load of firewood which it is alleged was removed by Mr Brown without payment, but more importantly there are allegations of sexual harassment of more than one female staff member which Avon seek to rely upon.

[17] First of all, it is necessary to consider whether it is available to a respondent employer in Avon's situation to call in aid such intelligence. Avon rely on *Salt v. Fell & Ors* [2008] NZCA 128 as authority for the proposition that subsequently discovered misconduct is relevant to the question of remedies and as reinstatement and interim reinstatement in particular is the remedy sought in this particular case then the *Salt v. Fell* principle applies. I agree with that view of the law and on that footing, now deal with the issues raised by Avon.

[18] Avon quite properly concede that the more important of the two subsequently discovered issues is the allegation (or more accurately a series of allegations) of sexual harassment allegedly perpetrated by Mr Brown against a number of women employed by Avon. This is a serious allegation made against a long serving and senior member of the Avon staff and Mr Brown can be forgiven for taking the rather cynical view that the allegations surfaced at a very convenient time for Avon.

[19] Through counsel, Mr Brown points out that the allegations are unspecific as to time and date and terribly diffuse in terms of the actual nature of the harassment alleged. Further, as I have just noted, Mr Brown alleges that the timing of these

allegations is nothing if not convenient for Avon. Of particular concern to the Authority is the fact that none of these allegations apparently had ever come to the employer's notice before and many of them may be significantly historical in nature given that Mr Brown had been employed in this business for 22 years. Some anyway of the now complainants had worked with him for much of that time as well.

[20] It was suggested to me at the investigation meeting that a consequence of Mr Brown's interim reinstatement would be the necessity for Avon to conduct inquiries into these sexual harassment allegations. I accept that submission on its face. Clearly, now that Avon is seized of these allegations against Mr Brown, if Mr Brown is to return to the workplace, then the allegations must be investigated. The implication the Authority took from Avon's submission in this regard was that it might be better and more straightforward for all concerned if that inquiry did not take place and by corollary, Mr Brown not be considered for interim reinstatement.

[21] I do not necessarily accept that implication. Mr Brown, having just been summarily dismissed for an offence which he denies is now subjected to further stress and worry as a consequence of a series of diffuse allegations which apparently have never surfaced before in any formal way, and it is suggested that there be no inquiry into the matters in dispute.

[22] For Mr Brown, this would give him no opportunity to address issues properly in the normal way and in particular, no prospect that he could potentially respond to allegations which may have no force or effect.

[23] It follows that I am persuaded that the existence of these serious allegations is in fact an argument in favour of interim reinstatement such that the matters can be properly addressed and all parties can be heard by the employer in a properly constituted investigation.

[24] The same argument seems to me to apply in relation to the post dismissal allegations that another load of firewood was taken by Mr Brown without authorisation. Again, that is an allegation which Mr Brown ought to respond to and the employer ought to consider that response based on the other information available to it.

[25] For Mr Brown, the arguments in favour of the granting of the remedy of interim reinstatement revolve around his financial vulnerability without continuity of

employment because interim reinstatement (and permanent reinstatement later on) are the only remedies which will appropriately restore Mr Brown's income stream and his obligation to provide for his wife who is not a bread winner. It follows that the remedy of damages payable of course as a lump sum, does not have the same efficacy.

[26] I conclude that the balance of convenience favours Mr Brown. I reach that conclusion partly because I doubt the efficacy of damages as an alternative to interim reinstatement, partly because I consider Mr Brown should have an opportunity to respond to the very serious allegations made against him post dismissal which, in truth, he has had no opportunity to respond to and partly because I am not persuaded that the prejudice to Mr Brown of being deprived of continuing employment is so great as to unreasonably burden Avon for the short period that will elapse between now the issue of the substantive determination.

Overall justice of the case

[27] Standing back and evaluating the case on the currently untested evidence before the Authority and the able assistance of both counsel, the Authority must look at the overall justice of the case as between the parties.

[28] The untested affidavit evidence in the submissions before me do not suggest a dysfunctional relationship between Mr Brown and his co-workers notwithstanding the late receipt of the sexual harassment allegations. I agree with Mr Fairclough that none of the affidavits of the women allegedly harassed by Mr Brown say unequivocally they could not work with him.

[29] Mr Brown is a long serving employee in this business and while his position would appear to be more supervisory than managerial, he certainly has some significant importance to the organisation. Mr Brown is a man of mature years and his conviction that he would struggle to find alternative employment is, in the current environment, probably a reasonably accurate assessment of his present predicament.

[30] Most importantly thought I am satisfied that Mr Brown ought to have the opportunity to respond appropriately to the serious post dismissal allegations that are made against him and the only proper way in which that can happen is on the footing that Mr Brown is returned to the employment, albeit on an interim basis. I accept there is a risk that the employer may consider that the post dismissal behaviour leads to further disciplinary consequences for Mr Brown which may, in effect, complicate

the substantive issue. However, I think that risk worth taking to give Mr Brown a proper opportunity to respond to the matters he is accused of and which he is yet to properly respond to.

[31] Finally though, the Authority must be sensitive to the needs of the women complainants who have raised issues of sexual harassment against Mr Brown. At the very least, it would be uncomfortable for them to be around Mr Brown while the employer is conducting any inquiries that it wishes to undertake in respect to this matter. It is for that reason that I have determined that, while I think the overall justice of the case also favours Mr Brown, and thus I am determined that he should be reinstated on an interim basis to his position in the Avon workplace, I think Mr Brown should be returned to the employment on a *garden leave* basis until the substantive hearing takes place in order to enable the employer to conduct whatever inquiries it thinks appropriate in respect to the allegations of sexual harassment, engage appropriately with Mr Brown in relation to those allegations and the other post dismissal allegation and make whatever findings Avon think appropriate.

Determination

[32] There will be an order reinstating Mr Brown on an interim basis to his former position at Avon but on the footing that Mr Brown is allocated a period of garden leave, such period to run from the date of his dismissal down to the date that the substantive determination issues, Mr Brown to receive his normal remuneration for that period but to remain away from the workplace save as explicitly directed by Avon.

Costs

[33] Costs are reserved.

James Crichton
Member of the Employment Relations Authority